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Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DONALD WAHLSTROM AND IRENE WAHLSTROM,
ADMINISTRATORS OF THE ESTATE OF
SCOTT WAHLSTROM

Petitioners,

vs.

KAWASAKI HEAVY INDUSTRIES, INC. LTD.,
KAWASAKI MOTORS CORP., U.S.A.,
KAWASAKI MOTORS MANUFACTURING CORP., U.S.A.

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the general maritime law permit recovery of survival damages, including lost future wages, for the death of a non-seaman who died within a state's territorial waters?

2. Does the general maritime law permit recovery of wrongful death damages, including loss of society damages, for the death of a non-seaman who died within a state's territorial waters?

3. Does the general maritime law permit recovery of punitive damages for the death of a non-seaman who died within a state's territorial waters?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	v
JURISDICTION	v
STATEMENT OF THE CASE	1
A. Factual Background	1
B. Procedural Background	1
REASONS FOR GRANTING THE WRIT	3
A. THIS COURT SHOULD RECOGNIZE A GENERAL MARITIME SURVIVAL RIGHT, AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT	3
B. STATE SURVIVAL STATUTES CAN FILL GAPS IN GENERAL MARITIME LAW WHERE THERE IS NO APPLICABLE FEDERAL STATUTE	7
C. THE RATIONALE FOR PRECLUDING LOSS OF FUTURE EARNINGS IS NOT PRESENT FOR THE DEATHS OF NON-SEAMEN WITH NO DEPENDENTS	14

D. THE ISSUE OF RECOVERY OF LOSS OF SOCIETY BY THE ESTATE OF A NON-SEAMAN WHO DIED IN TERRITORIAL WATERS IS AN IMPORTANT QUESTION OF FEDERAL GENERAL MARITIME LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. 15

E. PUBLIC POLICY DEMANDS THAT LOSS OF SOCIETY AND LOSS OF FUTURE EARNINGS BE AVAILABLE WHERE THE DECEDENT LEAVES NO DEPENDENTS 19

F. RECOVERY OF LOST EARNINGS IN A SURVIVAL ACTION, LOSS OF SOCIETY IN A WRONGFUL DEATH ACTION, AND PUNITIVE DAMAGES UNDER THE GENERAL MARITIME LAW, WHEN ARISING FROM A DEATH IN TERRITORIAL WATERS, WOULD NOT DIMINISH UNIFORMITY IN ADMIRALTY CASES 22

G. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND ESTABLISH THE PROPER STANDARD OF RECOVERY WHEN A NON-SEAMAN DIES WITHIN A STATE'S TERRITORIAL WATERS. . 25

CONCLUSION 26

APPENDIX . . . . . App. 1

TABLE OF AUTHORITIES

Page

CASES

Abbott v. United States, 207 F. Supp. 468 (S.D.N.Y. 1962) 13

Azzopardi v. Ocean Drilling and Exploration Co., 742 F.2d 890 (5th Cir.) 8

Barbe v. Drummond, 507 F.2d 794 (1st Cir. 1974) 8, 14

Comind, Companhia de Seguros v. Sikorsky Aircraft Div. of United Technologies Corp., 116 F.R.D. 397, 417 (D.Conn. 1987) 13

Cortes v. Baltimore Insular, Inc., 287 U.S. 367 (1932) 7

Dennis v. Central Gulf Steamship Corp., 453 F.2d 137, 140 (5th Cir. 1972) 10, 14, 23

Dugas v. National Aircraft Corp., 438 F.2d 1386 (3d Cir. 1971) 8

Ellison v. Messerschmitt-Bolkow-Blohm, 807 F.Supp. 39. (E.D.Tex. 1992) . 12, 13

Evich v. Morris, 819 F.2d 256 (9th Cir. 1987) 15, 24, 25

Favaloro v. S/S Golden Gate, 687 F.Supp. 475 (N.D.Cal. 1987) . . . 24

Floyd v. Fruit Indus. Inc., 144 Conn. 659, 676, 136 A.2d 918, 927 (1957) 9

Garner v. Dravo Basic Materials Company, 768 F.Supp. 192 (S.D.W.Va 1991) 10-12

Just v. Chambers, 312 U.S. 383 (1941) . . 8

Kling v. Torello, 132 Conn. 301, 305, 87 A. 987, 988 (1913) 10

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) . . . 3-7, 9-11, 14, 21, 22

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) 17, 18

Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) . . . 16, 18, 19

Offshore Logistics v. Tallentire, 477 U.S. 207 (1986) 17

Public Administrator of the County of New York v. Angela Compania Naviera, 592 F.2d 58 (2d Cir. 1979) 19

Romero v. International Terminal Operating Co., 358 U.S. 354, 374 (1959 8

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) . . . 22

Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1973) 16, 17, 20

Snyder v. Whittaker Corp., 839 F.2d 1085 (5th Cir. 1988) 8

Spiller v. Thomas M. Lowe, Jr. & Assocs., Inc., 466 F.2d 903, 909 (8th Cir. 1972) 8

The Harrisburg, 119 U.S. 199 (1886) . . 16

Thompson v. Offshore Co., 440 F.Supp. 752, 765. 20

Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084 (2nd Cir. 1993) 4, 5, 9, 19

OTHER AUTHORITIES CITED

28 U.S.C. §1254(1) v

46 App. U.S.C.A. §688 4

46 App. U.S.C.A. §§761-767 5

Conn. Gen. Stat. 52-572m 1

Conn. Gen. Stat. §52-240b 24

Conn. Gen. Stat. §52-555 9

Stuart M. Speiser, Charles F. Krause, Juanita M. Madole, Recovery for Wrongful Death and Injury, 3rd Ed., §3.50 (1992) 20

OPINIONS BELOW

The September 13, 1993 opinion of the Court of Appeals for the Second Circuit, is reported at 4 F.3d 1084 (1993), and is reprinted in the appendix to this petition, beginning at page App. 1.

The August 17, 1992 Order of the United States District Court for the District of Connecticut (Nevas, D.J.), is reported at 800 F.Supp. 1061 (1992) and is reprinted in the appendix to this petition, beginning at page App. 49.

JURISDICTION

The judgment of the Court of Appeals was entered on September 13, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. Factual Background

On June 19, 1988, Scott Wahlstrom was killed when the Kawasaki 650 SX jet ski that he was riding collided with a 20 foot 4 inch power boat in the Thames River in Connecticut, a navigable waterway within Connecticut's territorial waters. At the time of his death, Scott was seventeen years old, and his parents were not dependent on their son for financial support.

B. Procedural Background

Donald and Irene Wahlstrom, administrators of the estate of their deceased son, bring this action to recover compensatory and punitive damages under the Connecticut Products Liability Act, Conn. Gen. Stat. 52-572m, et. seq. from the defendant Kawasaki companies. The

defendant Kawasaki companies designed, manufactured and distributed the jet ski which was in a defective condition.

By Complaint dated June 15, 1990, the plaintiffs alleged that the Kawasaki Jet Ski was in a defective condition, in one or more of the following ways: in that it was excessively fast, capable of sudden and unexpected acceleration, unreasonably difficult to steer and control, not crashworthy, and did not adequately warn users of its hazards.

On August 2, 1991, the case was referred to Magistrate Latimer for the purpose of ruling on defendants' Motion for Summary Judgment, dated April 18, 1991. Oral argument was heard before Magistrate Latimer on September 26, 1991, and defendants' motion was granted on April 7, 1992. Plaintiffs objected to Magistrate Latimer's decision. Judge Alan H. Nevas

approved and adopted Magistrate Latimer's ruling on the Motion for Summary Judgment. On August 25, 1992, judgment entered against the plaintiffs.

Plaintiffs appealed to the Court of Appeals for the Second Circuit. Argument was heard on January 5, 1993, and judgment was entered on September 13, 1993. The Second Circuit deemed the complaint amended to state claims under general maritime law for wrongful death (App. 10-11) and survival damages (App. 41).

REASONS FOR GRANTING THE WRIT

A. THIS COURT SHOULD RECOGNIZE A GENERAL MARITIME SURVIVAL RIGHT, AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In Miles v. Apex Marine Corp., 498 U.S. 19 (1990), the Supreme Court addressed the narrow question of whether a seaman's

dependent relative could supplement her action for damages under the Jones Act, 46 App. U.S.C.A. §688, with a type of survival damages, loss of future earnings. The court held that the Jones Act permitted recovery of losses suffered during the decedent's lifetime only, and therefore, Jones Act damages could not be supplemented with lost future earnings.

In the present case, the Second Circuit extended Miles to a different context, the estate of a non-seaman killed on territorial waters, and denied recovery of lost future earnings in a general maritime law survival action. Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084 (2nd Cir. 1993). This case raises the issue of whether lost future earnings are recoverable in a general maritime law action where the decedent is not protected by a federal statute, such as the Jones Act

or the DOHSA, 46 App. U.S.C.A. §§761-767. The Supreme Court has never addressed this issue and should do so now.

The Miles prohibition against recovery of lost future earnings is limited plainly to actions involving the deaths of Jones Act seamen. Regarding the availability of any remedy to supplement the Jones Act, the court stated:

> We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them. Congress has placed limits on recovery in survival actions that we cannot exceed. Because this case involves the death of a seaman, we must look to the Jones Act. Miles, 498 U.S. at 36.

The Wahlstrom opinion acknowledges that the Miles court denied recovery because of the limitations in the Jones Act. Wahlstrom, 4 F.3d at 1093. The Second Circuit, nonetheless, found that the Miles holding was broader, "that a general

maritime survival action cannot include recovery for decedent's lost future earnings." Id. The court ignored the very clear statement in Miles that "because [the] estate cannot recover for his lost future income under the Jones Act, it cannot do so under general maritime law." Miles, 498 U.S. at 36. It is clear that when an estate has a Jones Act claim, the estate cannot be supplemented when that supplementation conflicts with the Jones Act. Where there is no potential federal statutory action, however, Miles is not a bar to recovery. The Second Circuit erred in precluding recovery of lost future income in this case.

The Supreme Court has never ruled on the kinds of damages available in a general maritime survival action where the decedent was unprotected by federal statute. The Miles court specifically denied the

petitioner's request to recognize a general maritime survival right, because only the "narrow question" of the recoverability of the lost future income of the decedent, a seaman, needed to be decided. This court should establish a general maritime survival action and permit a decedent's loss of future earnings to be recovered in that action where no statutory cause of action can be brought.

B. STATE SURVIVAL STATUTES CAN FILL GAPS IN GENERAL MARITIME LAW WHERE THERE IS NO APPLICABLE FEDERAL STATUTE.

Although the Supreme Court has not established a general maritime law survival action, see Cortes v. Baltimore Insular, Inc., 287 U.S. 367, 371 (1932), and the Supreme Court in Miles specifically refused to consider the question, the circuit courts have filled this gap by using state survival statutes to preserve a remedy for

a decedent's personal causes of action. Dugas v. National Aircraft Corp., 438 F.2d 1386 (3d Cir. 1971); Spiller v. Thomas M. Lowe, Jr. & Assocs., Inc., 466 F.2d 903, 909 (8th Cir. 1972); Barbe v. Drummond, 507 F.2d 794 (1st Cir. 1974); Azzopardi v. Ocean Drilling and Exploration Co., 742 F.2d 890, 893 (5th Cir. 1984); Snyder v. Whittaker Corp., 839 F.2d 1085, 1092 (5th Cir. 1988). This is consonant with the history of admiralty courts in applying state statutes where it "better becomes the humane and liberal character of admiralty proceedings." Cf. Romero v. International Terminal Operating Co., 358 U.S. 354, 374 (1959) ("Maritime law is not a monistic system. The State and Federal Governments jointly exert powers today as they have played joint roles in the development of maritime law throughout our history."); Just v. Chambers, 312 U.S. 383 (1941)

(state law may supplement or modify the maritime law where the state action is not hostile to characteristic features of maritime law). State survival statutes are to be applied where there is no conflict between the state law and the maritime law, as in this case, where a non-seaman dies on a state's territorial waters and the estate does not have a cause of action under either the Jones Act or the DOHSA.

In Wahlstrom, the Second Circuit misapplied Miles to the death of a non-seaman, denying the Wahlstroms' claim for survival damages under Connecticut law. Connecticut survival damages are provided under Conn. Gen. Stat. §52-555, which allows recovery of "the damages which decedent would have recovered if he had lived." Floyd v. Fruit Indus. Inc., 144 Conn. 659, 676, 136 A.2d 918, 927 (1957). The Connecticut statute eliminates the

anomaly of imposing a lesser punishment on tortfeasors who inflict fatal injuries upon another than on those who inflict nonfatal injuries. See Kling v. Torello, 132 Conn. 301, 305, 87 A. 987, 988 (1913). Connecticut law should apply in the state's territorial waters, where there is no conflict with maritime law. Dennis v. Central Gulf Steamship Corp., 453 F.2d 137, 140 (5th Cir. 1972). Contrary to the opinion of the Second Circuit, Miles does not restrict the recoverable damages for deaths of non-seamen in state territorial waters, and therefore, does not conflict with Connecticut law.

In Garner v. Dravo Basic Materials Company, 768 F.Supp. 192 (S.D.W.Va. 1991), a pleasure boat collided with a barge on the Little Kanawha River in West Virginia. The parents of the deceased brought a personal injury action under the general

maritime law, seeking the economic value of the loss of their son's life and to recover his lost future earnings. In discussing whether Miles was dispositive of the issue of lost future income, the court stated that Miles involved the death of a seaman and the Supreme Court appropriately looked to the Jones Act which limits recovery to losses suffered during the decedent's lifetime. "The Supreme Court refused to go beyond the congressionally limited system of recovery for a seaman's injury and death. These considerations are not present." Garner, 768 F.Supp. at 195.

The court properly held that the DOHSA and the Jones Act did not limit the recovery under the general maritime law where the plaintiff did not come within the purview of the statutes. "Recoverable damages are not limited by DOHSA since the incident did not occur on the high seas,

nor are recoverable damages limited by the Jones Act 'since [the deceased] was not a seaman.'" Garner, 768 F.Supp. at 194.

In allowing recovery, the court stated that "[i]t is inconsistent with federal maritime law to prohibit damages in the form of loss of future income when there is no explicit statutory or federal common law prohibition on such damages." Garner, 768 F.Supp. at 195. The Wahlstrom court should not have prohibited the estate from recovering lost future earnings, because no federal statute or Supreme Court case law precludes recovery in this case.

In Ellison v. Messerschmitt-Bolkow-Blohm, 807 F.Supp. 39. (E.D.Tex. 1992), the court held that the damages available under the Texas survival statute were available to a DOHSA plaintiff. "The occupied waters of maritime wrongful death law that the Supreme Court navigated in Miles do not yet

include survival actions, however. Congress' decision not to legislate in this area, and the Supreme Court's decision not to recognize a general maritime survival action leave these seas free to state law, at least for the present." Ellison, 807 F.Supp. at 42. The Ellison court held that "[u]ntil such time as Congress of the Supreme Court act to preempt state legislation in this area, state law still governs, and the appropriate elements of damages recoverable under a state survival statute will be determined by reference to state law." Id.; See also Abbott v. United States, 207 F. Supp. 468 (S.D.N.Y. 1962) (state survival statutes fill gap in general maritime law); Comind, Companhia de Seguros v. Sikorsky Aircraft Div. of United Technologies Corp., 116 F.R.D. 397, 417 (D.Conn. 1987) ("plaintiff asserting admiralty jurisdiction may pursue

supplemental remedies afforded under otherwise applicable state law provided the state law remedies are not irreconcilable with federal law").

The propriety of this choice of law analysis is borne out by the development of the award of another type of survival damages, pre-death pain and suffering. Courts which have permitted recovery of pre-death pain and suffering have done so on the theory that such an award is not precluded by federal statutes, such as the DOHSA. Cf. Dennis, 458 F.2d. at 140; Barbe, 507 F.2d at 799.

C. THE RATIONALE FOR PRECLUDING LOSS OF FUTURE EARNINGS IS NOT PRESENT FOR THE DEATHS OF NON-SEAMEN WITH NO DEPENDENTS.

In Miles, the Supreme Court held that lost future earnings could not be recovered under the general maritime law, because they could not be recovered under the Jones

Act. The purported rationale for precluding recovery of lost earnings in a survival action is to prevent the duplicative recovery that might occur if recovery was allowed to beneficiaries for loss of support in the wrongful death action and loss of future earnings in a survival action. Cf. Evich v. Morris, 819 F.2d 256 (9th Cir. 1987). Where there are no beneficiaries to claim loss of support, i.e., there is non-dependency, the danger of double recovery disappears. Evich, 819 F.2d at 258. Accordingly, recovery of future earnings should be allowed where there is no loss of support claim.

D. THE ISSUE OF RECOVERY OF LOSS OF SOCIETY BY THE ESTATE OF A NON-SEAMAN WHO DIED IN TERRITORIAL WATERS IS AN IMPORTANT QUESTION OF FEDERAL GENERAL MARITIME LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In 1970, this Court established a general maritime cause of action for wrongful death in territorial waters, overruling The Harrisburg, 119 U.S. 199 (1886), which prohibited federal common law recovery for wrongful death. Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970). The Court did not resolve the issue of who could recover or the kinds of recoverable damages. Delineating the classes of beneficiaries and remedies for wrongful death fell to the lower courts. The Moragne Court suggested that the courts look to state wrongful death statutes and the Death on the High Seas Act (DOHSA) for guidance.

In its first look at the kinds of recoverable damages, this Court in Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1973) held that loss of society damages were recoverable by a widow in a Moragne-

wrongful death action for the death of her longshoreman husband in state territorial waters. Since Gaudet, whenever this Court has ruled on wrongful death damages under general maritime law, the plaintiff was protected by the DOHSA and the plaintiff sought to supplement his/her recovery with damages under the general maritime law. The Court has held that where a death occurs on the high seas beyond a state's territorial waters, loss of society damages under Gaudet and the general maritime law may not supplement the decedent's DOHSA action. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978). Damages provisions of a state's wrongful death statute cannot supplement DOHSA where the death occurs on the high seas. Offshore Logistics v. Tallentire, 477 U.S. 207 (1986). The Court has not ruled upon the availability of loss of society damages in a general maritime

wrongful death cause of action arising in a state's territorial waters, where the estate is not protected by the DOHSA. The time has come for the court to do so.

Not since Moragne and Gaudet, has this Court looked at the damages available when a death occurs within the three mile limit. Because the DOHSA does not apply "to any waters within the territorial waters of any State", there was an expectation that state statutes would take care of those who died there. See Higginbotham, 436 U.S. at 625 ("Congress withheld a statutory remedy in coastal waters in order to encourage and preserve supplemental remedies.") Despite the Moragne court's insistence that the lower federal courts look to state wrongful death statutes for guidance in fashioning a wrongful death remedy, Moragne, 398 U.S. at 408. the courts, including the Second Circuit, have begun to look primarily to

the DOHSA. However, "[w]here a death is caused inside territorial waters, ... and a wrongful death action is brought under the general maritime law, the subsidiary elements of the cause of action may be different from or broader than those delineated in the Death on the High Seas Act." Public Administrator of the County of New York v. Angela Compania Naviera, 592 F.2d 58 (2d Cir. 1979). If the Moragne court wanted the DOHSA remedy adopted wholesale, it could have stated as much. The Moragne court did not intend its newly announced wrongful death cause of action to be a mere extension of DOHSA into state territorial waters.

E. PUBLIC POLICY DEMANDS THAT LOSS OF SOCIETY AND LOSS OF FUTURE EARNINGS BE AVAILABLE WHERE THE DECEDENT LEAVES NO DEPENDENTS.

The Second Circuit's Wahlstrom decision demonstrates the arbitrariness of

the distinction between dependents and non-dependents in determining who may recover for loss of society. The use of a pecuniary standard is inappropriate for an element of damage which "embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort and protection." Gaudet, 414 U.S. at 585. "[B]ecause a loss of society is not a financial loss, it would be inappropriate to conclusively presume that only those family members financially dependent on the decedent have suffered such a loss." Thompson v. Offshore Co., 440 F.Supp. 752, 765. Furthermore, the trend among the states is toward abolishing the requirement of dependency in order to recover loss of society, especially when the beneficiaries are the decedent's parents. Stuart M.

Speiser, Charles F. Krause, Juanita M. Madole, Recovery for Wrongful Death and Injury, 3rd Ed., §3.50 (1992).

If compensation for loss of society and loss of future earnings is denied a general maritime law plaintiff such as the estate of Scott Wahlstrom, there is a substantial probability that the deaths of young, non-seaman who die in territorial waters will go uncompensated. The pecuniary measure of damages available under the statutory scheme is not appropriate for this class of plaintiffs. Wrongful death actions such as this one serve an important purpose in reforming defective and dangerous products.

In Miles, this court recognized that the purpose of tort laws is to provide "efficient incentives to take care by insuring that the tort feasor will have to bear the total cost of the victim's injury

or death." Miles, 498 U.S. at 36. "Regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247 (1959). Disallowing recovery in cases where a product is marketed to those less likely to have dependents, and where it is extremely likely that the product will be used in territorial waters, impairs the reformative nature of tort laws.

F. RECOVERY OF LOST EARNINGS IN A SURVIVAL ACTION, LOSS OF SOCIETY IN A WRONGFUL DEATH ACTION, AND PUNITIVE DAMAGES UNDER THE GENERAL MARITIME LAW, WHEN ARISING FROM A DEATH IN TERRITORIAL WATERS, WOULD NOT DIMINISH UNIFORMITY IN ADMIRALTY CASES.

The Constitutional mandate for uniformity does not preclude recovery in this case. In Dennis v. Central Gulf Steamship Corp., 453 F.2d 137 (Fifth Cir. 1972), cert. denied, 409 U.S. 948 (1972), the court said that "[t]he 'uniformity' that is fundamental in maritime law has to do with the basis of liability. Not with differing elements of damages that may be recoverable in differing circumstances with differing classes of beneficiaries." Dennis, 453 F.2d at 140. Within admiralty jurisdiction, courts can differentiate between classes of plaintiffs and fashion the appropriate remedy for a particular class of plaintiffs.

The court does not have to prejudice this class of beneficiaries, non-dependent seamen who die in state territorial waters, for the sake of uniformity across all of the various beneficiaries and causes of

action. Treating an identifiable class differently from another is permissible as long as within the articulable class, all members are treated the same. Where injustice is being done to an entire class of plaintiffs, for the mere sake of uniformity, then this court must step in and correct the error.

In addition to claims for loss of future earnings and loss of society, plaintiffs also claim punitive damages under Connecticut law. Conn. Gen. Stat. §52-240b. Contrary to the Second Circuit opinion, and for the public policy reasons stated above, punitive damages should be available to a general amritime law plaintiff, especially when there is no DOHSA or Jones Act claim. Evich v. Morris, 819 F.2d 256 (9th Cir. 1987); Favaloro v. S/S Golden Gate, 687 F.Supp. 475 (N.D.Cal. 1987).

G. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS AND ESTABLISH THE PROPER STANDARD OF RECOVERY WHEN A NON-SEAMAN DIES WITHIN A STATE'S TERRITORIAL WATERS.

In the present case, the court denied recovery of lost wages to the estate. This decision conflicts with Evich v. Morris, 819 F.2d 256 (9th Cir. 1987), where the Ninth Circuit held that there is a general maritime survival action which allows for the recovery of lost wages. In Evich, the court said that a survivorship action prevents the anomaly of rewarding a tort feasor for killing a victim rather than injuring him. Evich, 819 F.2d at 258. The Court found that awarding loss of earnings in this context better became "the humane and liberal character of proceedings in admiralty." This court must resolve the conflict of whether a general maritime law survivorship action can include a claim for lost future income.

CONCLUSION

The existence of a general maritime survival action which includes a claim for lost future earnings and the existence of a general maritime wrongful death action which includes a claim for loss of society are important questions of federal law which the Supreme Court should decide, in light of the fact that the decedent in this case is not protected by federal statute.

Wherefore, the petition for writ of certiorari should be granted.

Respectfully submitted,

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No._____

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DONALD WAHLSTROM AND IRENE WAHLSTROM,
ADMINISTRATORS OF THE ESTATE OF
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Petitioners,

vs.

KAWASAKI HEAVY INDUSTRIES, INC. LTD.,
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KAWASAKI MOTORS MANUFACTURING CORP., U.S.A.

Respondents.

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APPENDIX

App. 1

United States Court of Appeals
For the Second Circuit

No. 774, Docket 92-7948

DONALD WAHLSTROM AND IRENE WAHLSTROM,
ADMINISTRATORS OF THE ESTATE OF
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Petitioners, Appellants,

vs.

KAWASAKI HEAVY INDUSTRIES, INC. LTD.,
KAWASAKI MOTORS CORP., U.S.A.,
KAWASAKI MOTORS MANUFACTURING CORP., U.S.A.

Respondents, Appellees.

Before: PRATT and MAHONEY, Circuit Judges, and ZAMPANO, District Judge. (The Hon. Robert C. Zampano, United States District Judge for the District of Connecticut, sitting by designation.)

Richard L. Newman, Bridgeport, Conn. (Michael F. Ewing, Cohen & Wolf, of counsel), for plaintiffs-appellants.

Richard A. Mueller, Coburn & Croft, St. Louis, Mo. (Trudie R. Hamilton, William I. Garfinkel, Carmody & Torrance, Waterbury, Conn., of counsel), for defendants-appellees.

MAHONEY, Circuit Judge:

Donald and Irene Wahlstrom ("the Wahlstroms") appeal from a judgment entered August 25, 1992 in the United States District Court for the District of Connecticut, Alan H. Nevas, Judge, that granted defendants' motion for summary judgment and dismissed the Wahlstroms' state law claims for the wrongful death of their son on the basis that a case involving a collision between two pleasure cleft on navigable waters falls within the court's admiralty jurisdiction and, under general maritime law, recovery of wrongful death damages is barred where plaintiffs are not dependents of the decedent. We

conclude that the state law claims were properly dismissed because actions brought under the federal courts' admiralty jurisdiction are governed solely by federal maritime law. We also conclude, however, that the Wahlstroms have stated, at least to some extent, a valid claim for wrongful death damages under federal maritime law to which there are disputed issues of material fact. Accordingly, the judgment of the district court is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

Background

The facts in this case are straightforward and undisputed. On June 19, 1988, Scott Wahlstrom ("Scott"), the 17-year old son of the Wahlstroms, was killed when the rented Kawasaki 650 SX Jet Ski that he was operating collided with a twenty-foot power boat on the Thames River,

a navigable waterway, within Connecticut territorial waters. The Wahlstroms, as the administrators of Scott's estate, brought an action under the Connecticut Product Liability Act, Conn.Gen.Stat § 572m et seq. (1991), and the Connecticut Unfair Trade Practices Act, Conn.Gen.Stat. §42-110a et seq. (1992), against Kawasaki Heavy Industries, Ltd., Kawasaki Motors Corp., U.S.A., and Kawasaki Motors Manufacturing Corp., U.S.A. (collectively "Kawasaki"), the companies that designed, manufactured, and distributed the rented Jet Ski that Scott was using at the time of his accident, basing federal jurisdiction upon diversity of citizenship. The Wahlstroms sought compensatory damages, attorney fees pursuant to Conn.Gen.Stat. § 52-240a (1991), and punitive damages pursuant to Conn.Gen. Stat. §§ 52-240b (1991) and 42-110g(a) (1992).

Kawasaki moved for summary judgment on the basis that the action was governed solely by federal maritime law, which barred the Wahlstroms from any recovery. Opposing the motion, the Wahlstroms argued that the case was governed by Connecticut law, but even if federal maritime law applied, Scott's estate was entitled to recover damages. Judge Nevas referred the case to Magistrate Judge Arthur H. Latimer to rule on that motion.

In a recommended ruling issued April 7, 1992, Magistrate Judge Latimer determined that Kawasaki's motion should be granted. See Wahlstrom v. Kawasaki Heavy Indus., Ltd., 800 F.Supp. 1061 (D.Conn. 1992). He concluded that the case wall governed by federal maritime law, id. at 1062-63, and that "the general maritime law does not allow the nondependents of a decedent who is not a seaman to recover

wrongful death damages for his death arising in state territorial waters." Id. at 1063 (citing Anderson v. Whitaker Corp., 692 F.Supp. 764, 770-73 (W.D.Mich. 1988), aff'd in part rev'd in part on another ground, 894 F.2d 804 (6th Cir. 1990); Truehart v. Blandon, 672 F.Supp. 929, 936-38 (E.D.La. 1987)). Reviewing the applicable Supreme Court precedents, Magistrate Judge Latimer stated:

> A collective reading of these cases reveals three points: (1) the Supreme Court has never held that a nondependent beneficiary may recover loss of society, i.e., nonpecuniary, damages in a general maritime wrongful death action; (2) the explicit language of the DOHSA does not permit the recovery of non-pecuniary damages, nor may such recovery be supplemented by state wrongful death statutes or the general maritime law where the DOHSA governs; and (3) the Jones Act does not provide wrongful death damages to the nondependent survivors of a deceased seaman.

Id. at 1065.

Stressing the need for uniformity in admiralty law, the anomaly of allowing a recovery to the Wahlstroms that would not be available to them if Scott had been a member of the specially favored class of seamen, and the overall fairness of a distinction between dependents and nondependents, the magistrate judge concluded that the Wahlstroms' claims, including their application for punitive damages, should be dismissed. Id. at 1065-66.

The Wahlstroms objected to this recommended ruling, contending that "admiralty jurisdiction is inappropriate in this products liability case," and in any event that the magistrate judge had erred in his analysis of federal maritime law. After review and over the Wahlstroms' objections, however, the district court

approved and adopted the magistrate judge's recommended ruling. Id. at 1061.

Judgment was then entered in favor of Kawasaki. This appeal followed.

Discussion

It is settled law that a tort claim involving a collision between two vessels, used for pleasure or commercial purposes, on navigable waters comes within the admiralty jurisdiction of the federal courts. See Foremost Ins. Co. v. Richardson, 457 U.S. 668, 677, 102 S.Ct. 2654, 2659, 73 L.Ed.2d 300 (1982); In re Guglielmo, 897 F.2d 58, 61 (2d Cir. 1990). The parties to this appeal do not dispute that both the Jet Ski operated by Scott and the power boat involved in the collision are vessels under 1 U.S.C. § 3 (1988),[1] or

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[1] "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on

that the Thames River (at the location where the fatal collision occurred) is a navigable waterway. Further, the Wahlstroms concede on appeal that this case falls within the admiralty jurisdiction of the federal courts. With this jurisdiction comes the application of substantive maritime law, and absent a relevant federal statute, we apply the general maritime law as developed by the courts. East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 864, 106 S.Ct. 2295, 2298, 90 L.Ed.2d 865 (1986). That law includes elements adopted from the law of products liability. See id. at 865-66, 106 S.Ct at 2299.

The Wahlstroms advance two contentions on appeal: (1) federal maritime law does not preclude the application of state

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water." 1 U.S.C. §3 (1988).

wrongful death statutes, and therefore the Connecticut Products Liability Act and its wrongful death provisions should govern this action; or (2) in the alternative, if this court finds that federal maritime law governs, the principles underlying the Connecticut wrongful death provisions should be used to fashion the federal maritime remedy. Before considering these contentions, we address a preliminary matter.

The Wahlstroms did not request relief under federal maritime law in their complaint; rather, they raised only state law claims. Nor did they seek leave to file an amended complaint to include a claim for wrongful death damages under federal maritime law. Kawasaki, however, raised the applicability of federal maritime law as an affirmative defense, and this issue was extensively discussed by

Magistrate Judge Latimer in his recommended ruling. Further, the parties' briefs and oral argument on appeal focused squarely on the issue of what relief, if any, is available to the Wahlstroms under federal maritime law. Accordingly, we deem the Wahlstroms' complaint to be constructively amended to include a claim for relief for wrongful death damages under federal maritime law. See 6A Charles A. Wright et al., Federal Practice and Procedure § 1494, at 5556 (2d ed. 1990) (appellate courts, using Fed.R.Civ.P. 15(b) by way of analogy, permit constructive amendment of pleadings "only when the effect will be to acknowledge that certain issues upon which the lower court's decision has been based or issues consistent with the trial court's judgment have been litigated"); see also Purified Down Prods. Corp. v. Travelers Fire Ins. Co., 278 F.2d 439, 444 (2d Cir.

1960) (where insurer did not assert counterclaim for back premiums and issue was not raised by pleadings, but attorney for insured admitted premiums were due, appellate court deemed pleadings amended to conform to the evidence); Menefee v. W.R. Chamberlin Co., 183 F.2d 720, 721 (9th Cir. 1950) (where injured seaman alleged only leg injury but evidence of back injury was also presented without objection, the back injury was regarded on appeal as matter that had been tried by lower court); cf. Walton v. Jennings Community Hosp., Inc., 875 F.2d 1317, 1320 n. 3 (7th Cir.1989) (collecting cases in which district and appellate courts allowed constructive amendment of complaints).

A. Application of State Law in a Maritime Wrongful Death Action.

Magistrate Judge Latimer dismissed the Wahlstroms' state law claims because those

claims "'would be in conflict with the applicable substantive admiralty law.'" Wahlstrom, 890 F.Supp. at 1063 (quoting Icelandic Coast Guard V. United Technologies Corp., 722 F.Supp. 912, 949 (D.Conn. 1989)). According to Magistrate Judge Latimer, because Connecticut tort law would permit recovery of damages by nondependent beneficiaries and maritime law would not, the Supremacy Clause mandates preemption of state law in this case. Id. We go further and hold that federal maritime law, whether or not it conflicts with state law, applies to actions for wrongful death in state territorial waters brought under the admiralty jurisdiction of the federal courts. We premise this holding upon Supreme Court precedent which, over the past thirty-three years, has transformed the face of the federal maritime wrongful death remedy.

In The Harrisburg, 119 U.S. 199, 213, 7 S.Ct. 140, 146, 30 L.Ed. 358 (1886), the Supreme Court, after reviewing maritime law "as accepted and received by maritime nations generally," held that there was no right to recover for wrongful death under the general maritime law "in the absence of a statute giving the right" The Court "express[ed] no opinion" whether a suit could be maintained under a state wrongful death statute, because the suit at issue would have been barred in any event by the applicable state statutes of limitations. Id. at 214, 7 S.Ct at 147. In Western Fuel Co. v. Garcia, 257 U.S. 233, 242, 42 S.Ct. 89, 90, 66 L.Ed. 210 (1921), however, the Court did reach the issue and held that state wrongful death statutes could provide a remedy for a wrongful death in state territorial waters.

In 1920, Congress changed the complexion of the recovery available for wrongful death under maritime law by passing two statutes which specifically afforded federal remedies for wrongful death to certain classes of plaintiffs in maritime actions. One statute, the Death on the High Seas Act ("DOHSA"), 46 U.S.C.app. §§ 761-767 (1988), gave the representative of anyone killed on the high seas (i.e., more than three miles from shore) the right to bring a wrongful death action.[2] DOHSA explicitly does not apply

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[2] 2. Section 761 provides:

> Whenever the death of a person shall he caused by wrongful act, neglect. or default occurring on the high seas beyond a marine league from the shore of any State. or the District of Columbia. or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the

to "any waters within the territorial limits of any State." Id. § 767. The second statute, the Jones Act, 46 U.S.C.app. § 688 (1988), gave the personal representative of a seaman who died in the course of employment the right to maintain a wrongful death action for negligence.[3]

United States, in admiralty for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

Section 762 provides:

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

[3] Section 688 provides, in pertinent part:

There was still, however, no right of recovery under the general maritime law for deaths in state territorial waters of nonseamen or seamen who died as a result of a vessel's unseaworthiness rather than negligence. Thus, after the enactment of DOHSA and the Jones Act, some actions for wrongful death in territorial waters could still be brought under state wrongful death statutes. See, e.g., The Vessel M/V "Tungus" v. Skovgaard, 358 U.S. 588, 592, 79 S.Ct. 503, 506, 3 L.Ed.2d 524 (1959)

> (a) Application of railway employee statutes; jurisdiction
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> ... [I]n case of the death of any seaman as a result of any ... personal injury [suffered, in the course of his employment] the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury. and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.

(right of recovery for wrongful death in state territorial waters, and limitations on that right, were those established by state law).

All of this changed with the Supreme Court's decision in Moragne v. States Marine Lines Inc., 398 U.S. 375,90 S.Ct 1772, 26 L.Ed.2d 339 (1970). In Moragne, the Court overruled The Harrisburg and held that "an action does lie under general maritime law for death caused by violation of maritime duties." Id. at 409. The Court was addressing the specific issue of what, if any, remedy should be available for a wrongful death caused within state territorial waters by a vessel's unseaworthiness, a claim for which there was no right of recovery under applicable state law. Id. at 376-77. In fashioning the remedy, however, the Supreme Court did not limit the new right of recovery to

unseaworthiness claims, but instead established a general remedy for wrongful death under maritime law. In doing so, the Court stated:

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. E.g., Hess v United States, 361 U.S. 314 [80 S.Ct. 341,4 L.Ed.2d 305] (1960); Goett v. Union Carbide Corp., 361 U.S. 340 [80 S.Ct. 357, 4 L.Ed.2d 341] (1960). Such uniformity not only will further the concerns of [DOHSA and the Jones Act] but also will give effect to the constitutionally based principle that federal admiralty law should be a "system of law coextensive with, and operating uniformly in, the whole country." The Lottawanna, [88 U.S. 558]21 Wall. 558, 575 [22 L.Ed. 684] (1875).

Id. at 401-02 (footnote omitted). In our view, the Supreme Court's creation in Moragne of a federal wrongful death action under general maritime law precludes the

use of state wrongful death statutes in maritime claims. Without such preclusive effect, "the tensions and discrepancies" resulting from application of state remedial statutes could not be removed.

This view is fortified by rulings of the Supreme Court and other federal courts. In Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978), the Supreme Court recognized that under Moragne one national rule applies to fatalities in territorial waters. According to the Court, the Moragne rule of uniformity was needed because, at the time the case was decided, "fatal accidents on the high seas had an adequate federal remedy, while the same accidents nearer shore might yield more generous awards, or none at all, depending on the law of the nearest State." Id. at 624 n. 18. Other courts have concluded that after Moragne,

federal maritime law "'displaces state wrongful death statutes in territorial waters.'" Neal v. Barisich, Inc., 707 F.Supp. 862, 866 & n. 5 (E.D.La.) (quoting Thurmond v. Delta Well Surveyors, 836 F.2d 952, 958 n.2 (5th Cir. 1988) (Garwood, J., concurring)) (collecting cases), aff'd mem., 889 F.2d 273 (5th Cir. 1989); see also Nelson v. United States, 639 F.2d 469, 473 (9th Cir.1980) (holding that "the need for uniformity in maritime death actions requires extension of Moragne to cover claims based on negligence, to the exclusion of state wrongful death statutes"); In re S/S Helena (Sincere Navigation Corp. v. United States), 529 F.2d 744, 753 (5th Cir. 1976) (Moragne wrongful death remedy "precludes recognition in admiralty of state statutes"); Shield v. Bayliner Marine Corp., 822 F.Supp. 81, 83 (D.Conn. 1993)

("The fact that plaintiff relies partly on diversity jurisdiction does not affect the rule that maritime law applies. Thus, to the extent plaintiff seeks to recover under Connecticut state law, his claim must be dismissed.") (citing Wahlstrom, 800 F.Supp. at 1062-63); Gilmore v. Witschorek, 411 F.Supp. 491, 494 (E.D.Ill. 1976) (same); cf. Icelandic Coast Guard, 722 F.Supp. at 949 ("Even if plaintiff's commercial losses would be cognizable under the applicable state tort law products liability scheme of either Iceland or Connecticut, claims for such losses nonetheless are not permitted where they would be in conflict with the applicable substantive admiralty law [footnote omitted]."); In re DFDS Seaways (Bahamas) Ltd, 684 F.Supp. 1160, 1162 (S.D.N.Y. 1987) ("It is well settled that federal maritime law is to be applied to the exclusion of conflicting state law even

in state courts."); Complaint of Cambria S.S. Co. (Ruschmiller v. Dahl), 505 F.2d 517, 521 (6th Cir. 1974) (although death occurred in state territorial waters, court declined to apply state law because post-Moragne appellate decisions "have endeavored generally to develop a uniform body of federal law, neither borrowing automatically from federal statutory provisions, nor applying any particular state law"), cert. denied, 420 U.S. 975, 95 S.Ct 1399, 43 L.Ed.2d 655 (1975). Accordingly, we conclude that federal maritime law, rather than Connecticut law, must be applied in the present case.

B. Wrongful Death Action under Federal Maritime Law.

Moragne established a wrongful death action under the general maritime law. The court refrained in Moragne, however, from addressing any "subsidiary issues" relating

to the new cause of action, such as the measure of damages and the schedule of beneficiaries, preferring that the "final resolution" of such questions "await further sifting through the lower courts in future litigation." 398 U.S. at 408, 90 S.Ct at 1792. These issues are presented for consideration in this case.

1. Right of Nondependent Parent to Recover for the Wrongful Death of a Child.

Magistrate Judge Latimer held that the Wahlstroms were barred from any recovery because "the general maritime law does not allow the nondependents of a decedent who is not a seaman to recover wrongful death damages for his death arising in state territorial waters." 800 F.Supp. at 1063 (citing Anderson, 692 F.Supp. at 770-73; Truehart, 672 F.Supp. at 936-38). This conclusion is overbroad, and is not supported by the cases invoked in its

behalf. Anderson awarded damages for loss of support and services, and loss of society, only to the dependent survivors (widows and children) of two persons killed in a boating accident, and specifically disallowed such damages for the nondependent parents of the other two persons who were fatally injured in that accident. 692 F.Supp. at 769-73. Survival damages (for the decedents' pain and suffering prior to death) were awarded, however, to all of the plaintiffs, both dependents and nondependents. Id. at 773-74. Thus, Anderson limits the damages that may be awarded, but does not support the proposition that no damages may be awarded, to a nondependent parent.

Similarly, Truehart dismissed the claim for loss of society of the nondependent survivors (two parents and two siblings) of a person killed in a boating

accident, but did not dismiss the complaint 672 F.Supp. at 930, 938. Indeed, emphasizing the fact that the litigation was to continue as to the plaintiffs' other claims, the district court certified the loss of society ruling for immediate appellate review pursuant to 28 U.S.C. § 1292(b) (1988). 672 F.Supp. at 938; see also id. at 934 n. 4 ("even if not entitled to loss of society damages, nondependent survivors may still maintain wrongful death actions for pecuniary damages such as funeral expenses and, perhaps, loss of services"). Moreover, the plaintiffs subsequently achieved a $53,000 settlement of their remaining claims. See Truehart v. Blandon, 696 F.Supp. 210, 211 (E.D.La. 1988), rev'd on other grounds, 884 F.2d 223 (5th Cir.1988); see also Cantore v. Blue Lagoon Water Sports, Inc., 799 F.Supp. 1151, 1152 (S.D.Fla. 1992) (parents of

decedent killed in fatal Jet Ski accident may recover medical and funeral expenses, but for loss of society only if actual financial dependency on decedent is proven, and for loss of services only if actual pecuniary damages proven for loss of valuable services; estate may recover for decedent's pain and suffering before death, but not for future economic loss).

It is therefore inappropriate to rule that the Wahlstroms may achieve no recovery for their son's wrongful death. The Supreme Court counselled in Higginbotham that: "As Moragne itself implied, DOHSA should be the courts primary guide as they refine the nonstatutory death remedy, both because of the interest in uniformity and because Congress' considered judgment has great force in its own right." 436 U.S. at 624, 98 S.Ct at 2014 (footnote omitted). The pertinent provision of DOHSA, 46

U.S.C.app. § 761, authorizes the personal representative of a decedent to sue "for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative," see supra note 2, thus indicating that a parent need not be a dependent of the decedent to have standing to recover some damages. See First Nat'l Bank v. National Airlines, 288 F.2d 621,624 (2d Cir.) (DOHSA "requires a showing of dependency on the part of all claimants except a wife, husband, parent or child of the decedent"), cert. denied, 368 U.S. 859, 82 S.Ct. 102, 7 L.Ed.2d 57 (1961). The companion provision, 46 U.S.C.app. § 762, however, limits a DOHSA recovery to "a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought," see supra note 2, indicating that the focus of our analysis should be upon the elements of

damage recoverable by nondependent parents such as the Wahlstroms. We proceed to that inquiry.

2. The Elements of Damages Recoverable by a Nondependent Parent for the Wrongful Death of a Child.

The predominant issue on this appeal is the availability of damages for loss of society to the nondependent parents of a decedent who perishes under circumstances giving rise to admiralty jurisdiction. We shall accordingly address our initial attention to this aspect of the Wahlstroms' claim, and then consider other elements of damages at least arguably encompassed by the Wahlstroms' demand for compensatory and punitive damages in their complaint. We begin this inquiry by reviewing the post-Moragne decisions of the Supreme Court in this area.

In its first subsequent visitation of the admiralty wrongful death action established in Moragne, the Supreme Court ruled in Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974), that in the case of a longshoreman who died as a result of severe injuries incurred on a vessel in Louisiana navigable waters, "the decedent's dependents may recover damages for their loss of support, services, and society, as well as funeral expenses." Id. at 584; see also id. at 591 ("in addition to recovery for loss of support, services, and society, damages for funeral expenses may be awarded under the maritime wrongful-death remedy in circumstances where the decedent's dependents have either paid for the funeral or are liable for its payment").

The Court next ruled in Higginbotham that the Gaudet allowance of loss-of-

society damages to a dependent of a decedent who perished in territorial waters could not be extended to the high seas in view of the DOHSA limitation of damages to "pecuniary loss," see 436 U.S. at 622-26, 98 S.Ct. at 2013-15, and reiterated this ruling in Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 216, 233, 106 S.Ct. 2485, 91 L.Ed.2d, 174 (1986). Both Higginbotham and Tallentire, like Gaudet and Moragne, were suits by dependent widows of the decedents.

Miles v. Apex Marine Corp., 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), addressed, however, the situation of a nondependent mother who sought loss-of-society damages for the death in territorial waters of her seaman son. The Fifth Circuit had held that "in a general maritime wrongful death action nondependent parents may not recover for loss of society

whether or not their deceased children were survived by spouse or child." Miles v. Melrose, 882 F.2d 976, 989 (5th Cir.1989), aff'd sub nom. Miles v. Apex Marine Corp., 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990). The Supreme Court affirmed on the differing ground "that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman," 498 U.S. at 33, 111 S.Ct. at 326, thus "restor[ing] a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." Id. The Court also stated that: The holding of Gaudet applies only in territorial waters, and it applies only to longshoremen." Id. at 31, 111 S.Ct at 325.

As Magistrate Judge Latimer noted, none of these cases support the recovery of loss-of-society damages joy a nondependent

beneficiary in a general maritime wrongful death action, and both DOHSA and the Jones Act have been construed by the Court to bar such damages where those statutes apply. See 809 F.Supp. at 1065. This does not settle the question presented by this appeal, however, because neither DOHSA nor the Jones Act is applicable, and no Supreme Court ruling bars the award of loss-of-society damage to the Wahlstroms.

On the other hand, a number of other federal courts have explicitly addressed the issue whether nondependent parents may recover loss-of-society damages for a death in territorial waters, and have almost unanimously responded in the negative. Both the Fifth Circuit, see Miles, 882 F.2d at 989, and Sixth Circuit, see Anderson, 894 F.2d at 812, have so ruled, and most of the pertinent district court decisions concur. See Cantore, 799 F.Supp. at 1155;

Kline v. Maritrans CP, Inc., 791 F.Supp. 455, 461 (D.Del. 1992) (Jones Act seaman); Rollins v. Peterson Builders, Inc., 761 F.Supp. 918, 929 (D.R.I. 1990) (on reconsideration, reversing prior ruling in light of Miles v. Apex Marine Corp.); Anderson, 692 F.Supp. at 771-72; DFDS Seaways, 684 F.Supp. at 1164 (no recovery for nondependent parent of decedent survived by a spouse); Glod v. American President Lines, 547 F.Supp. 183,186 (N.D.Cal.1982) (nondependent siblings). But see Thompson v. Offshore Co., 440 F.Supp. 752, 764-65 (S.D.Tex. 1977); Palmer v. Ribax, Inc., 407 F.Supp. 974, 979 (M.D.Fla. 1976); Hamilton v. Canal Barge Co., 395 F.Supp. 978, 985 (E.D.La. 1975). Thompson and Hamilton can no longer be regarded as authoritative in light of the subsequent evolution of Fifth Circuit law. See Miles, 882 F.2d at 989 (no recovery by

nondependent parents in general maritime wrongful death action); Sistrunk v. Circle Bar Drilling Co., 770 F.2d 455, 458 n. 2 (5th Cir.1985) (Hamilton undermined by Supreme Court rating in Higginbotham), cert. denied, 475 U.S. 1019, 106 S.Ct. 1205, 89 L.Ed.2d 318 (1986).

We agree with the overwhelming majority of the pertinent federal decisions that nondependent parents cannot recover damages for loss of society in a general maritime action. We recognize the argument that an essentially pecuniary standard such as dependency should not provide the dividing line on this issue, given the nature of loss-of-society damages. See Gaudet, 414 U.S. at 585, 94 S.Ct. at 815. ("The term 'society' embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care,

attention, companionship, comfort and protection."); Thompson, 440 F.Supp. at 765 ("because a loss of society is not a financial loss, it would be inappropriate to conclusively presume that only those family members financially dependent on the decedent have suffered such a loss"). Countervailing concerns nonetheless outweigh the force of this contention.

The primary considerations that we must consult in resolving this issue are "the humane policies implicit in the judicially created cause of action [for maritime wrongful death] and ... the interest in the uniform administration of admiralty actions." Public Adm'r v. Angela Compania Naviera, S.A., 592 F.2d 58, 63 (2d Cir.), cert. denied, 443 U.S. 928, 100 S.Ct. 15, 61 L.Ed.2d 897 (1979). It would hardly promote the uniform administration of admiralty actions for this circuit to

adopt a rule in conflict with almost every decided federal case on this issue. In addition, in view of the special regard accorded by admiralty to seamen, it would be anomalous to expand the class of beneficiaries of nonseamen who may recover for loss of society in the aftermath of the Supreme Court's denial of any such recovery to the beneficiaries of seamen. See Miles, 498 U.S. at 33, 111 S.Ct. at 326 (denying any recovery for loss of society to beneficiaries of seamen); see also Wahlstrom, 800 F.Supp. at 1066 (citing Miles, 498 U.S. at 36, 111 S.Ct. at 327, regarding special solicitude shown by admiralty for seamen and their families); Truehart, 672 F.Supp. at 927 ("General maritime law is its most generous to seamen, the wards of admiralty.").

Finally, a ruling in favor of the Wahlstroms on this issue would effectively

extend the rule of Gaudet to nondependent parents of persons who die in territorial waters. This would hardly be consonant with the Court's unanimous statement in Miles that the holding of Gaudet applies only in territorial waters, and only to longshoremen. 498 U.S. at 31, 111 S.Ct. at 325. See Miller v. American President Lines, 989 F.2d 1450, 1459(6th Cir.1993) (Miles limited Gaudet to its facts, but Gaudet is not applicable to those facts in view of subsequent enactment of Longshore and Harbor Workers Compensation Act; Gaudet thus "condemned to a kind of legal limbo: limited to its facts, inapplicable on its facts, yet not overruled"); Murray v. Anthony J. Bertucci Constr. Co., 958 F.2d 127, 130 (5th Cir.) (Miles limited Gaudet to its facts), cert. denied ___ U.S. ___, 113 S.Ct. 190, 121 L.Ed.2d 134(1992). Even if the limitation of Gaudet in Miles is

read, more favorably to Gaudet, as focused upon the distinction between longshoremen and seamen, we perceive no basis for an extension of Gaudet to allow recovery by nondependent parents under the general maritime law. Cf. Walker v. Braus, 995 F.2d 77, 82 (5th. Cir. 1993) (allowing widow of non-seaman deceased victim of accident in Louisiana territorial waters to recover for loss of consortium "would directly contradict the policy of uniformity emphasized and relied on by the Court in Miles").

For all these reasons, we conclude that the Wahlstrom may not recover damages for loss of society in this case, and proceed to address the other elements of damages that will require consideration upon remand.

The Wahlstroms may recover damages for funeral expenses to the extent that they

paid for their son's funeral or are liable for that payment. See Gaudet, 414 U.S. at 591 & nn. 27-28, 94 S.Ct. at 818 & nn. 27-28; Cantore, 799 F.Supp. at 1156; Neal, 707 F.Supp. at 868 & nn. 14-15; Truehart, 672 F.Supp. at 936. They also may recover for related medical expenses. Cantore, 799 F.Supp. at 1156. Damages for mental anguish may not be recovered. See Gaudet, 414 U.S. at 585 n. 17, 94 S.Ct at 815 n. 17; Thompson, 440 F.Supp. at 765. Loss of support or services is compensable, but only to the extent that the Wahlstroms anticipated future pecuniary benefits from support or services to be rendered to them by their deceased son. See Gaudet, 414 U.S. at 584-85, 94 S.Ct. at 814; In re P & E Boat Rentals, Inc. (Fusselman v. Ennia Gen. Ins. Co.), 872 F.2d 642, 649 (5th Cir. 1989); Cantore, 799 F.Supp. at 1155; Kline,

791 F.Supp. at 462-469; *DFDS Seaways*, 684 F.Supp. at 1164-65.

C. Survival Action under Federal Maritime Law

Magistrate Judge Latimer stated that the Wahlstroms had "apparently abandoned at oral argument any conceivable claim for survival as opposed to wrongful death damages." 800 F.Supp. at 1065. On appeal to the district court and to this court, the Wahlstroms argued primarily for wrongful death damages pursuant to Connecticut law, but cited a survival case, Evich v. Morris, 819 F.2d 256 (9th Cir.), cert. denied, 484 U.S. 914, 108 S.Ct 261, 98 L.Ed.2d 218 (1987), in both fora, and contended generally fur "wrongful death and survivorship benefits" in their main brief to this court. We deem the issue of survivor damages preserved.

The distinction between survival and wrongful death actions was articulated by the Fifth Circuit in Miles as follows:

> In a survival action, the estate or successors of a deceased person are allowed to prosecute a claim for personal injury that the deceased would have had but for his death. In a wrongful death action, the victim's dependents, not the victim, are allowed to recover for the harms they personally suffered as a result of the death, independent of any action the decedent may have had for his own personal injuries.

882 F.2d at 985; see also Shield, 822 F.Supp. at 83.

The elements of damage ordinarily pursued in a survival action are pain and suffering inflicted upon the decedent prior to death, and loss of future earnings. The Wahlstroms may recover damages for their son's pain and suffering prior to death, to the extent that it can be established at trial. See Miles, 882 F.2d at 985; Evich,

819 F.2d at 257-58; P & E Boat Rentals, 872 F.2d at 649-50; Shield, 822 F.Supp. at 83 (collecting cases); Cantore, 799 F.Supp. at 1156; Kline, 791 F.Supp. at 462-67. Evich also allowed recovery by the decedent's estate for loss of future earrings, reasoning that in the absence of dependent beneficiaries, "potential problems with double recovery do not exist," 819 F.2d at 258, and concluding that such a recovery "'"better becomes the humane and liberal character of proceedings in admiralty."'" Id. (quoting Moragne, 398 U.S. at 387 (quoting The Sea Gull, 21 F.Cas. 909, 910 (C.C.D.Md.1865) (No. 12,578))). Most of the decided cases, however, are to the contrary.

The Supreme Court disallowed such a recovery in Miles. See 498 U.S. at 33-37. The Court's analysis relied heavily upon the decedent's status as a seaman and the

resultant applicability of the Jones Act, see id. at 35-36, but the announced conclusion of its opinion (unlike the companion ruling as to loss of society) was not confined to seamen. See id. at 37 ("We ... hold that a general maritime survival action cannot include recovery for decedent's lost earnings.").

The circuit court ruling in Miles explicitly rejected Evich on this issue, 882 F.2d at 986, and concluded, without any reference to the decedent's seaman status, that "the general maritime law does not permit a survival action for the decedent's lost future wages." Id. at 987. The court noted that most state survival statutes and the Jones Act do not allow recovery for lost wages, and that DOHSA provides no action for any kind of survivorship benefit Id.

A number of district court opinions also preclude recovery for lost future earnings in a federal maritime action. See Shield, 822 F.Supp. at 83; Cantore, 799 F.Supp. at 1155; Kline, 791 F.Supp. at 462 (seaman). We concur, concluding that the Wahlstroms may claim damages for their son's pain and suffering prior to death, but not for lost earnings. Nor may damages be awarded for loss of enjoyment of life. See Shield, 822 F.Supp. at 83-84 (citing In re Korean Air Lines Disaster, 807 F.Supp. 1073, 1080-83 (S.D.N.Y. 1992)); see also In re Korean Air Lines Disaster; 814 F.Supp. 592, 599 (E.D.Mich.1992).

D. Punitive Damages.

Since the Wahlstroms' complaint seeks punitive damages, and we have deemed the complaint amended to state a claim under general maritime law, the issue is

presented whether they may recover punitive damages under that law.

Magistrate Judge Latimer dismissed the Wahlstroms' claim for punitive damages, stating:

> In light of the decision to grant judgment against plaintiffs' state wrongful death claim as a matter of law, any claim for punitive damages must also be dismissed. Cf. Neal v. Barisich, Inc., supra [707 F.Supp.] at 873 (holding that because punitive damages are non-pecuniary, a plaintiff has standing to seek them under the general maritime law only if having standing to seek other nonpecuniary losses); cf. also Alcorn County, Miss. v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1170 (5 Cir. 1984).

800 F.Supp. at 1066.

We are in general agreement with the view that plaintiffs who are not allowed by general maritime law to seek nonpecuniary damages for loss of society should also be barred from seeking nonpecuniary punitive damages. In addition, a number of district

courts have invoked the Supreme Court's ruling in Miles as a basis to disallow punitive damages for claims under the general maritime law in order to further uniformity between that law and the analogous federal statutes, DOHSA and the Jones Act. See, e.g., CEH, Inc. v. FV "Seafarer", 148 F.R.D. 469, 472 (D.R.I. 1993) (collecting cases); Boykin v. Bergesen D.Y.A/S, 822 F.Supp. 324, 326 (E.D.Va.1993) (federal decisions are "increasingly less receptive to recovery of punitive damages in a general maritime law survival action"); Ortega v. Oceantrawl, Inc., 822 F.Supp. 621, 622 (D. Alaska 1992); In re Cleveland Tankers, Inc., 791 F.Supp. 679, 680-82 (E.D.Mich. 1992). Most of these cases involved claims by seamen, and there are a few district court rulings to the contrary. See Cleveland Tankers, 791 F.Supp. at 682 n. 3 (collecting cases).

Overall, however, this post-Miles authority lends additional support to our conclusion that the Wahlstroms should not be allowed to pursue punitive damages under the general maritime law.

Conclusion

The judgment of the district court is vacated and the case is remanded for further proceedings not inconsistent with this opinion. On remand, the Wahlstroms may seek wrongful death damages for funeral and medical expenses, and loss of support and services, but not for loss of society. They may seek survival damages for their son's pain and suffering prior to death, but not for loss of future earnings or loss of enjoyment of life. They may not seek punitive damages.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DONALD AND IRENE WAHLSTROM,
ADMINISTRATORS OF THE ESTATE
OF SCOTT WAHLSTROM,
Plaintiffs

vs. CIVIL NO.
H-90-481(AHN)

KAWASAKI HEAVY INDUSTRIES,
LTD., KAWASAKI MOTORS CORP.,
U.S.A., KAWASAKI MOTORS
MANUFACTURING CORP., U.S.A.,
Defendants

RULING ON DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

Plaintiffs bring this diversity action, cf. 28 U.S.C. § 1332 (a), as administrators of the estate of Scott Wahlstrom, their 17-year old son who died leaving no dependents. They seek wrongful death damages under the Connecticut product Liability Act, Conn. Gen. Stat. § 52-572m, et seq. including punitive damages, from the defendant Kawasaki companies that designed, manufactured and distributed the rented jet ski their son was using when he

was killed in a collision with a motor boat on the Thames River, in Ledyard, Connecticut. Defendants have moved for summary judgment, cf. Rule 56(c), Fed. R. Civ. P., arguing that plaintiffs' state law claim must be dismissed because the instant action involves a collision between two pleasure craft on navigable waters, and is therefore governed by this court's admiralty jurisdiction. Cf. 28 U.S.C. § 1331(1); see also Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982); Sisson v. Ruby, 497 U.S. __, 58 U.S.L.W. 4941 (1990). With admiralty jurisdiction controlling, defendants further argue that the general maritime law, a uniform body of tort common law identified by the Supreme Court in Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), must be applied -- meaning in this case that pertinent federal decisional law would apply, automatically

precluding any reliance on Connecticut state tort law. See, e.g., Kermarec v. Compagnie Generale, 358 U.S. 625 (1958); Neal v. Barisich, Inc., 707 F. Supp. 862 (E.D. La.), aff'd, 889 F.2d 273 (5 Cir. 1989). Defendants also assert that when the general maritime law is applied to the present case, recovery of any wrongful death damages is barred because plaintiffs are not dependents of the decedent, see Truehart v. Blandon, 672 F. Supp. 929 (E.D. La. 1987) and punitive damages are also barred since no such award can be made when compensatory damages are unavailable, see Neal v. Barisich, Inc., supra at 873. For the reasons stated below, defendants' motion for summary judgment is granted.

As a threshold matter, defendants are correct that plaintiffs' attempted wrongful death claim is governed by admiralty because this case, involving a collision

between a jet ski and a motor boat, satisfies the Supreme Court's twofold jurisdictional test: (1) the alleged tort occurred on a navigable waterway; and (2) it bears a significant relationship to a traditional maritime activity. Cf. Executive Jet Aviation, Inc. v. City of Cleveland, Ohio, 409 U.S. 249 (1972). First, it is undisputed that the Thames River is a navigable waterway for purposes of admiralty jurisdiction, as it is capable of serving as "a highway for maritime commerce". The Daniel Ball, 77 U.S. 557 (1870). Second, contrary to plaintiffs' position, it makes little difference that the decedent was killed while operating a recreational jet ski: such a craft can and properly should be defined as a "vessel" under current maritime jurisdictional analysis. See 1 U.S.C. § 3 ("the word 'vessel' includes every description of

watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water"); cf. also Keys Jet Ski, Inc. v. Kays, 893 F.2d 1225 (11 Cir. 1990); Matter of Guglielmo, 897 F.2d 58 (2 Cir. 1990). In this regard, the operation of a motorized jet ski, like a small motor boat, sufficiently implicates traditional maritime activities. Foremost, supra at 676. As plaintiffs' complaint essentially alleges that decedent was killed as a result of "a collision between two vessels on navigable waters . . . [it] properly states a claim within the admiralty jurisdiction of [this] federal court", id. at 677; see also Sisson, supra, 58 U.S.L.W. at 4943 (holding that "navigation is an example, rather than a sole instance, of conduct that is substantially related to traditional maritime activity"). It is important to

note that this conclusion is not affected by either: (1) plaintiffs' deliberate reliance on diversity of citizenship, and not admiralty, as a basis of federal jurisdiction, because maritime principles would govern in any event, cf. Kermarec, supra at 628; or (2) plaintiffs' specific assertion of a product liability claim, as that theory of liability is currently incorporated within the law of admiralty, cf. East River S.S. Corp. v. Transamerica Delaval. Inc., 476 U.S. 858 (1986)

Finding that admiralty jurisdiction exists here does not, however, require that defendants' "automatic preclusion" argument be addressed at this time. Admittedly, defendants do offer strong reasons for establishing a bright line rule designed to exclude the use of state wrongful death statutes for deaths occurring within territorial waters. See, e.g., Moragne,

supra at 401, n. 1; Neal v. Barisich, Inc., supra at 866-867; Matter of S.S. Helena, 529 F.2d 744, 752 (5 Cir. 1976). However, "it appears that [that] choice of law question is not relevant to disposition of [the now pending] summary judgment motion . . . [because plaintiffs' state claims] are not permitted [in any event] where they would be in conflict with the applicable substantive admiralty law". Icelandic Coast Guard v. United Technologies Corp., 722 F. Supp. 942, 949 (D.Conn. 1989) (Cabranes, J.); see also Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 222 (1986) (holding that "reverse-Erie" doctrine requires that substantive remedies afforded by state law conform to federal maritime standards); Complaint of DFDS Seaways (Bahamas) Ltd., 684 F. Supp. 1160 (S.D.N.Y. 1987) ("It is well settled that federal maritime law is to be applied

to the exclusion of conflicting state law even in state courts" (emphasis in original and citations omitted)). In other words, defendants' call for preemption is mandated here not by application of abstract choice-between-laws principles but by the force of the Supremacy Clause standing alone. Cf. U.S. Const. art. VI. As defendants correctly point out, Connecticut state tort law permits the recovery of damages brought by the beneficiaries of a decedent without regard for dependence. Cf. Conn. Gen. Stat. § 52-572m, et seq. In contrast, the general maritime law does not allow the nondependents of a decedent who is not a seaman to recover wrongful death damages for his death arising in state territorial waters. See, e.g., Anderson v. Whittaker Corp., 692 F. Supp. 764, 770-773 (W.D. Mich. 1988), rev'd in on other grounds, 894 F.2d 804 (6 Cir. 1990) (nondependent

parents of two recreational boaters killed after their boat capsized on Lake Michigan cannot recover wrongful death damages in the form of loss of society); Truehart, supra at 936-938 (nondependent parents and siblings of pleasure boat passenger killed within navigable waters cannot maintain action for loss of society). This federal law difference is independently sufficient to require dismissal of plaintiffs' state law claims "as a matter of law", Rule 56(c), Fed. R. Civ. P.

At common law, it was assumed that all personal injury actions died with the plaintiff. Recognizing the unfairness of such an inflexible rule, state legislatures began to enact wrongful death statutes. These wrongful death statutes permitted the survivors of a decedent to seek damages for the loss they suffered as a result of the death. See Sea-Land Services, Inc. v.

Gaudet, 414 U.S. 573, 584 (1973). Such recovery typically included pecuniary damages in the form of loss of support and services, medical and funeral expenses, and non-pecuniary damages such as loss of society. Id. In turn, courts in admiralty often applied these state statutes to preserve suits for death at sea. In The Harrisburg, 119 U.S. 199 (1886), the Supreme Court acknowledged this statutory trend but adhered to the position that in the absence of such an applicable statute, the general maritime law does not recognize a cause of action for wrongful death. The practical effect of this decision was to foreclose recovery by representatives of a decedent killed on the high seas due to a breach of general maritime law, but allow recovery for those killed on territorial waters where state tort law generally applied. Adding further to this confusion

was the fact that even where a state statute applied, the action was still subject to the many substantive limitations imposed by state law. See The Tungus v. Skovgaard, 358 U.S. 588 (1959) (state statute denying a cause of action based on unseaworthiness, i.e., a form of strict liability for shipowners).

In 1920, Congress attempted to provide uniformity with respect to certain federal maritime interests by passing the Death on the High Seas Act, 46 U.S.C. § 761 et seq. ("DOHSA") and the Jones Act, 46 U.S.C. § 688. Under the DOHSA, Congress bypassed the rule in The Harrisburg by establishing a statutory right of action for loss of pecuniary damages by the beneficiaries of a decedent killed outside state territorial waters. The DOHSA reads in part:

> "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on

> the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued."

46 U.S.C § 761. As well, wishing to protect those who ventured out to sea for a living, Congress enacted the Jones Act on behalf of seamen and their families, which was modeled after the older Federal Employers' Liability Act, 45 U.S.C. §§ 51-59 ("FELA"), and provides in pertinent part:

> "[I]n the case of the death of a seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law . . . [and] all statutes of the United States conferring or regulating the right of action

> for death in the case of railway employees shall be applicable."

46 U.S.C. § 688; see also Gillespie v. United States Steel Corp., 379 U.S. 148 (1964). Despite expanding the remedies available in admiralty, "this mixture of state and federal law amounted to statutory chaos", Truehart, supra at 932. Typical of such confusion was the anomaly identified in Moragne, supra at 395, that the dependent widow of a deceased longshoreman could not recover wrongful death damages based on a theory of unseaworthiness where his death occurred in state waters. This was so because the Jones Act and state law required a particular showing of negligence; while the DOHSA, though not limited as to bases of liability, extended only to deaths on the high seas. Id.

In Moragne, the Supreme Court finally recognized that an independent,

nonstatutory right of recovery for wrongful death under the general maritime law was needed to eliminate the remedial void created by a patchwork of state and federal legislation. Id. at 409. In overruling The Harrisburg, the Moragne Court stated "that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country'", id. at 402 (quoting The Lottawanna, 88 U.S. 558, 575 (1874)). Not surprisingly, this need for national uniformity has been the guiding principle in admiralty law ever since. Miles v. Apex Marine Corp., 498 U.S. at __, 59 U.S.L.W. 4001, 4006 (1991). The Moragne Court did make it a point not to delineate all the elements of its new general maritime cause of action for wrongful death. Moragne, supra at 408. Instead, the Court concluded that the task of establishing the

parameters for this new admiralty cause of action should be left to the "further sifting through the lower courts in future litigation", id. On the specific question of intended wrongful death beneficiaries which is at issue here, however, the Moragne Court did not appear to reserve judgment. The case involved a dependent widow, and the Court's general maritime law analysis consistently made reference to only the dependents of the decedent as the proper class of beneficiaries in a wrongful death action. Cf. Truehart, supra at 932 (quoting Moragne, 398 U.S. at 382, "[I]n the case of death, those closest to him [the decedent] -- usually spouse and children -- seek to recover for their total loss on whom they depended").

This reading of Moragne, and sense of the Supreme Court's considered view, is even clearer from a review of the major

post-Moragne decisions by the Court. Starting with Sea-Land Services v. Gaudet, supra at 590, the Supreme Court held that the dependent wife of a longshoremen who was killed in state waters was entitled to non-pecuniary damages in the form of loss of society even though the decedent had already obtained a judgment for his own personal injuries. Implicit in the Gaudet opinion was the understanding that only dependent beneficiaries could recover such damages. Id. at 583 ("[T]he policy underlying the [wrongful death] remedy is to insure compensation of the dependents for their losses resulting from the decedent's death . . ."") (emphasis added); see also Glod v. American President Lines, Ltd., 547 F. Supp 183 (N.D. Cal. 1982). Then, in Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 623 (1978), the Court held that in a general maritime action for

wrongful death occurring on the high seas, recoverable damages must be governed exclusively by the DOHSA, which permitted only pecuniary losses, and a showing of financial dependence was a requirement under the DOHSA. Id. In Offshore Logistics, Inc. v. Tallentire, supra at 211, the Court settled any doubt as to whether the nondependents of a decedent killed on the high seas may recover loss of society damages. The Court there ruled that a wrongful death action founded on an applicable state statute (which theoretically might permit recovery by a nondependent) was preempted by the DOHSA -- and where the DOHSA controls, nondependents could not recover such damages. Id. at 233. Finally, in Miles v. Apex Marine Corp., supra, 59 U.S.L.W. at 4004, the Court made clear that the nondependent mother of a deceased seamen could not

recover for loss of society under the general maritime law. Applying the logic of Higginbotham, the Court held that where a wrongful death action for the death of a seaman is involved, the Jones Act, which permits the recovery of only pecuniary losses, must prescribe the type of damages available and cannot be supplemented by the general maritime law. Id. at 4005.

A collective reading of these cases reveals three points: (I) the Supreme Court has never held that a nondependent beneficiary may recover loss of society, i.e., nonpecuniary, damages in a general maritime wrongful death action; (2) the explicit language of the DOHSA does not permit the recovery of non-pecuniary damages, nor may such recovery be supplemented by state wrongful death statutes or the general maritime law where the DOHSA governs; and (3) the Jones Act

does not provide wrongful death damages to the nondependent survivors of a deceased seaman. In response, with plaintiffs having first apparently abandoned at oral argument any conceivable claim for survival as opposed to wrongful death damages, cf. Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 890 (5 Cir. 1984), plaintiffs basically assert that the Supreme Court and the Second Circuit have never expressly prohibited the recovery of wrongful death damages by the nondependents of a deceased nonseaman killed within territorial waters. Yet plaintiffs fail for good reason to point to any case which has permitted such recovery. In reality, those decisions which have dealt with this issue have uniformly held that dependency is a prerequisite to recovery. Compare Anderson v. Whittaker, supra at 770-773 (denying nondependents' wrongful death claim) and

Truehart, supra at 936-938 (same) with Evich v. Morris, 819 F.2d 256 (9 Cir.), cert. denied, 484 U.S. 914 (1987) (permitting the recovery of a decedent's future lost income under a survival action, not a wrongful death claim). Beyond apparent consensus in the case law when closely examined, in any event, such decisions as Truehart and Whittaker, expressly supporting defendants' stance, are based on sound reasoning.

First, to deny wrongful death damages to Scott Wahlstrom's parents, who concededly were not financially dependent on their teenage son, lends more uniformity to admiralty jurisdiction. Cf. Miles, supra at 4006. As previously discussed, neither the Jones Act or the DOHSA affords nondependents such recovery; likewise, the general maritime law cannot supply such damages when either statute applies. Thus,

in order to avoid the admiralty "patchwork" of remedial schemes common in pre-Moragne days, it would seem best to limit recovery here even though this case is governed neither by the Jones Act or the DOHSA. See, e.g., Truehart, supra at 936; Whittaker, supra at 772.

Second, plaintiffs' attempts to distinguish Miles and similar cases on the basis that they involved seamen would appear unpersuasive. "[A]dmiralty courts have always shown a special solicitude for the welfare of seamen and their families", Miles, supra at 4006 (emphasis added). Yet in the face of this particular concern, Congress still decided that wrongful death damages under the Jones Act must be "limited to the sort of pecuniary losses that only dependents of a seaman are likely to suffer", Truehart, supra at 772. It is true, the Miles court did note with respect

to the Jones Act that it "sailed in occupied waters . . . and was not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them", id. at 4006. As defendants here correctly point out, however, the impact of the considered and settled decision in Miles is to render it anomalous to award the nondependent survivor of a nonseaman a recovery which is patently denied to the nondependent beneficiary of a well-deserving seaman. In effect, to allow plaintiffs to recover wrongful death damages here simply because their son was not a Jones Act seaman would ironically, and improperly, leave the relatives of seamen as a less-favored class under admiralty. Cf. Truehart, supra at 937 (holding that because the "[g]eneral maritime law is its most generous to seamen, the wards of admiralty", it would

refuse to "craft for nonseamen's survivors a remedy not available to seamen's survivors"); cf. also Whittaker, supra at 773.

Finally, because it is agreed that "somewhere a line must be drawn" to determine which beneficiaries may sue for damages in wrongful death, the line between dependents and nondependents seems to be "the most rational, efficient and fair", Truehart, supra at 938. Most notably, "[a] requirement of dependency creates a finite, determinable class of beneficiaries", id. This reasoning also found support in Whittaker, where the court stated, id. at 772:

> "[I]t is inherent in the nature of wrongful death remedies that not every survivor is entitled to recover monetary damages. A line must be drawn; without the express terms of a statute to guide the Court, it must draw a boundary that is most in line with the purposes underlying

> creation of the remedy. This Court is in agreement with Truehart in concluding that a limit based upon dependence is in line with the philosophy of Moragne and subsequent cases."

Accordingly, the state claims asserted here by the parents of Scott Wahlstrom must be dismissed.

In light of the decision to grant judgment against plaintiffs' state wrongful death claim as a matter of law, any claim for punitive damages must also be dismissed. Cf. Neal v. Barisich, Inc., supra at 873 (holding that because punitive damages are non-pecuniary, a plaintiff has standing to seek them under the general maritime law only if having standing to seek other non-pecuniary losses); cf. also Alcorn County, Miss. v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1170 (5 Cir. 1984).

Subject to review, cf. 28 U.S.C. § 636(b), defendants' pending motion for summary judgment is accordingly granted.

Dated at New Haven, Connecticut, this 7th day of April, 1992.

ARTHUR H. LATIMER
UNITED STATES MAGISTRATE JUDGE